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Recommended Citation
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH	/	
Plaintiff/Respondent	/	
V	/	Case No 990494-CA
RANDOLPH CARPENTER	/	
Defendant/Appellant	/	Priority No 2

BRIEF OF APPELLANT

This appeal is from a final order and judgment wherein Appellant plead guilty of one count of Illegal Possession of a Controlled Substance, a second degree felony, in violation of Section 58-37-8 U.C.A. (1953) The Appellant was sentenced to serve an indeterminate term of not less than one (1) year and not more than fifteen (15) years. on a plea of guilty, the Defendant reserved the right to appeal the Trial Courts refusal to suppress the evidence.. This Court has jurisdiction pursuant to Utah Code Ann. Section 78-2-2(3)(i). Appellant's conviction was entered by Judge W. Brent West on May 12, 1999.

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FILED
Utah Court of Appeals
DEC 16 1999
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Clerk of the Court

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Defendant/Appellant	/	Priority No 2

BRIEF OF APPELLANT

This appeal is from a final order and judgment wherein Appellant plead guilty of one count of Illegal Possession of a Controlled Substance, a second degree felony, in violation of Section 58-37-8 U.C.A. (1953) The Appellant was sentenced to serve an indeterminate term of not less than one (1) year and not more than fifteen (15) years. on a plea of guilty, the Defendant reserved the right to appeal the Trial Courts refusal to suppress the evidence.. This Court has jurisdiction pursuant to Utah Code Ann. Section 78-2-2(3)(i). Appellant's conviction was entered by Judge W. Brent West on May 12, 1999.

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RANDOLPH CARPENTER	/	Judge_____
Defendant/Appellant	/	Priority No. 2

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from the Defendant plea of guilty to one count of Illegal Possession/Use of a Controlled Substance, a second degree felony, in violation of Section 57-37-8 U. C. A. (1953). The plea was before the Honorable W. Brent West, after the Court refused to suppress evidence after a suppression hearing held the 12th day of February, 1999. One May 12, 1999 the Defendant was sentenced

to serve an indeterminate term of not less than one year nor more the fifteen years at the Utah State Prison The notice of appeal was filed with this Court.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did defense counsel deny Defendant's right to effective assistance of counsel in violation of his constitutional right to counsel as guaranteed by the United States Constitution VI Amendment,; the United States Constitution XIV Amendment, Utah Constitution Section 7 and 12, see also Strickland v. Washington, 466 U. S., at pg. 667, 104 S. Ct. 2852 (1984); State v. Templin, 805 P 2d 182 (1990) when the appointed attorney did not file a motion for suppression of evidence, thereby requiring the Defendant to file a motion Pro Se?

2. Did defense counsel deny Defendant's right to effective assistance of counsel in violation of his constitutional right to counsel as guaranteed by the United States Constitution VI Amendment, the United States Constitution XIV Amendment, Utah Constitution Section 7 and 12, see also Strickland v. Washington 466 U. S. at pg. 667, 104 S Ct 2852 (1984), State v. Templin 805 P. 2d 182 (1990) when the State's attorney filed a brief opposing the Defendant's Motion to Suppress and the Defendant's appointed attorney failed to file either a memorandum supporting Defendant's motion to suppress evidence or a memorandum in response to the State's memorandum opposing the motion to suppress evidence?

3. Did the Trial Court commit reversible error when it failed to suppress evidence obtained under a search warrant where it was not "an all persons search warrant", and the search warrant only provided "to make a search of the above named or described premises for controlled

substances)"?

4. Did the Trial Court commit reversible error when it ruled that the Defendant had no standing to contest the search of the house, because he was only a guest in the house, and yet permitted testimony that the Defendant had the black box in his possession, when, in fact, the box was on the floor of the living room and not on the Defendant's person?

STANDARD OF REVIEW

1. Where ineffective assistance of counsel is raised for the first time on appeal, the Appellate Court must determine, as a matter of law, whether the Defendant was denied effective assistance of counsel State v. Callahan66 P 2d 590 (Utah App 1993) Questions of law are reviewed for correctness, the Appellate Court giving no particular deference to the trial courts ruling. Mountain Fuel Supply Co v. Salt Lake City Corp. 749 P 2nd 884 (Utah 1988)

2. The issues presented in this case surround the trial court's determination that the Appellant had no standing to challenge the scope of the search warrant. The Appellant Court reviews the legal conclusions of the trial correct under a correction of error standard, affording no deference to the trial court. State v. Kolster 869 P2d 993 at 995 (Utah App 1994)

STATEMENT OF THE CASE

STATE OF UTAH V CARPENTER
Case Number 990494-CA

The Defendant was initially charged in the 2nd Judicial District Court for Weber County with a First Degree Felony, Possession of a Controlled Substance, with the Intent to Distribute, to wit: Cocaine. On the 17th day of November, 1998 the Defendant, pro se, filed a motion to suppress evidence that was obtained by execution of the search warrant on the 14th day of August, 1998. The trial court held a suppression hearing on the 12th day of February, 1999. The Court permitted testimony as to what each officer felt occurred in the execution of the search warrant. The Trial Court ruled that the Defendant did not have standing to challenge the search warrant as it related to a search of the house. The Court then ruled that the search warrant was broad enough to allow the officer to testify that the box containing cocaine which was on the floor and not on the Defendant was actually in his possession..

The Defendant plead guilty to a second degree felony, Illegal Possession/Use of a Controlled Substance on the 7th day of April, 1999, but reserved the right to appeal the Court's denial of his suppression motion. (T. Pleas Hearing p. 2)

STATEMENT OF FACTS

On August 14, 1998 police officers assigned to the Weber-Morgan Narcotics Drug Force executed a search warrant at 2534 Orchard Ave, Ogden, Utah. (T

Suppression Hearing pg's 3-4) At the time of execution of the search warrant the Defendant was present in the house. (T Suppression Hearing, p. 31) The search warrant did not authorize the search of any specific individual, but was issued to search the house for the presence of crack cocaine. (T Suppression Hearing, pg's 21-22)

When the Officers entered the house they observed the Defendant lying on the floor in front of a couch. The Defendant was lying with his head to the East and his arms were out to his side. (T Suppression Hearing, pg's 31-32) Officer Burnett testified that he never saw the Defendant with the so-called black box in his hand, and never saw the Appellant dive to the ground with something in his hand. (T. Suppression Hearing, p 47) Further, the Defendant never acknowledged to Officer Burnett that he had anything to do with the black box. (T. Suppression Hearing, p. 48)

However, Officer Jensen testified that he saw the Defendant sitting on the end of the couch with a black object in his left hand. (T. Suppression Hearing, pg's. 59-60) Further, Officer Jensen testifies that he saw the Defendant drop or throw the black box to the ground. (T. Suppression Hearing, p 60.) In fact, the Defendant denied ownership of the back box. (T Suppression Hearing, pg's 40 and 76) The

Defendant did not testify at the suppression hearing.

The Court, ruling on the Defendant's motion to suppress stated that , based upon the oral testimony given at the suppression hearing, the Defendant did not have standing to question the search of the home in that particular situation. In regards to the black box, it was unclear whether or not the Defendant was the owner of the box. However, the Court ruled that the box was in the possession of the Defendant. Therefore, this gives him standing to question the legality of that particular search.

On the other hand, it becomes a factual issue as to whether or not the State can, in fact, prove beyond a reasonable doubt that the Defendant possessed that box with the intent of distribute as it's been indicated there and I think its an issue that does go to the jury. In face, there was no cocaine found on Defendant's person.

The Court was of the opinion that the search warrant was broad enough. They were at this house to look particularly for objects that could have contained drugs. They did not search the Defendant because they didn't have a warrant to search the Defendant. They were entitled to search objects. They searched the box pursuant to a warrant that allowed them to be there and inside it they found cocaine. Therefore the motion to suppress was denied. (T. Suppression Hearing, pg's 87-88)

As a result of a plea bargain with the State, on April 7, 1999, the Defendant

pled guilty to one count of Illegal Possession/Use of a Controlled Substance (T. Plea Hearing, p 8)

SUMMARY OF ARGUMENT

The Defendant was denied effective assistance of counsel. Despite the Defendant's request, his defense counsel failed to file a motion to suppress evidence obtained by reason of execution of the search warrant, thereby requiring the Defendant to pro se, file a motion to dismiss, Also by the Defendant's, attorney failing to file a memorandum in support of the Defendant's pro se, motion to suppress or a reply memorandum to the State's opposition to granting the Defendant's motion to suppress evidence.

The Trial Court committed reversible error when it ruled that the Defendant had no standing to challenge the search warrant as to the search of the house, but, that evidence obtained which linked the Defendant to possession of the so-called "black box" which contained the controlled substance would be submitted to the jury.

ARGUMENT

POINT I
THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE UNITED STATES CONSTITUTION, VI

STATE OF UTAH V CARPENTER
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AMENDMENT, UNITED STATES CONSTITUTION, AMENDMENT XIV, UTAH STATE CONSTITUTION ARTICLE I, SECTIONS 7 AND 12, WHERE, DESPITE THE REQUEST OF THE DEFENDANT TO HIS COUNSEL TO FILE A MOTION TO SUPPRESS EVIDENCE OBTAINED BY EXECUTION OF A SEARCH WARRANT, COUNSEL FAILED TO FILE A MOTION TO SUPPRESS, THEREBY REQUIRING THE DEFENDANT TO PREPARE AND FILE, PRO SE, HIS MOTION TO SUPPRESS.

At approximately 9:25 p.m on August 14, 1998 the Weber Morgan Narcotics Drug Force executed a search warrant and searched a residence at 2534 Orchard Street in Ogden, Utah. (T . Suppression Hearing, pg's 3-4) The warrant only authorized the officers to search the house for drugs, it did not permit the search of any individual in the house for drugs. (T. Suppression Hearing, p 88) The only evidence linking the Defendant to cocaine was the testimony of only one of the three officers who unequivality testified that he saw the Defendant holding the black box, which contained the cocaine. Absent this testimony, there was no evidence linking the Defendant to the drugs.

The Trial Court in denying the Defendant's motion to dismiss made two inconsistent rulings. The first was that the Defendant did not have standing to question the search of the home in this particular situation. The second, regarding the black box was although it was unclear whether or not he was the owner of the

box, the Defendant had the box in his possession. (T. Suppression Hearing, p. 87) The Court then stated that the issue is a factual issue of whether or not the State can, in fact, prove beyond a reasonable doubt that the Defendant possessed the cocaine that was in the black box with intent to distribute is an issue that goes to the jury. However, the Defendant is in a difficult position of not being able to dispute the testimony of ne police officer who was willing to testify that he saw the box in the possession of the Defendant.

If the jury believed the testimony of the police officer, it puts the Defendant in an impossible position because this court had stated that in reviewing a claim of insufficiency of the evidence, the Appellate Court views the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the jury verdict. It is only when the evidence as viewed in this light is sufficiently inconclusive or inherently improbable that a jury must have entertained a reasonable doubt as to the Defendant's guilt that it is proper to overturn the conviction State v James 819 P 2d 781 at 785 (Utah 1991)

This Court in the case of State v. Simmons 866 P 2d 614 (Utah App 1993) held at pg 617:

> "Suppression of evidence is an appropriate remedy for illegal police conduct only when the conduct implicates a

> fundamental violation of defendant's rights." State v. Rowe, 850 P. 2d 427, 429 (Utah 1992). "'It is only where the violation also implicates fundamental, constitutional concerns, is conducted in bad-faith or has substantially prejudiced the defendant that exclusion may be an appropriate remedy.'" State v Fixel 744 P. 2d 1366, 1369 (Utah 1987) (quoting Commonwealth v. Mason, 507 PA. 396, 490 A. 2d 421, 426 (1985), accord Rowe II 850 P 2d at 429. The proponent of a motion to suppress has the burden of establishing that his [or her] Fourth Amendment rights were violated by the challenged search or seizure." Rakas v. Illinois, 439 U. S. 128, 130 n. 1, 99 S. Ct. 421, 424 n. 1, 58 L Ed 2nd 387 (1978); accord State v. Atwood 831 P. 2d 1056 , 1058 n. (Utah App. 1992). We therefore reverse the court's determination that the search was a fundamental violation of the Simmonses' constitutional rights.

With the heavy burden on the Defendant to successfully prepare, with supporting citations, a motion to suppress, it was ineffective assistance of counsel to necessitate the Defendant to prepare his own motion to suppress. Further, defense counsel was ineffective in not preparing and filing either a memorandum supporting the Defendant's pro se motion to suppress evidence obtained by a search of the house or a reply memorandum to the State's memorandum opposing the Defendant's motion to dismiss.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED THAT THE DEFENDANT HAD NO

STANDING TO CONTEST THE SEARCH WARRANT, BUT THAT EVIDENCE OBTAINED BY EXECUTION OF THE SEARCH WARRANT MAY BE INTRODUCED INTO EVIDENCE, THE WEIGHT OF THE EVIDENCE TO BE DETERMINED BY THE JURY.

At the Suppression Hearing held on the 12th day of February, 1999 the Trial Judge, after hearing evidence and considering the argument of counsel ruled that the Defendant did not have standing to question the search of the home in this particular situation After listening to the testimony of the witnesses, especially the testimony of Officer Jensen, the Court ruled that the Defendant had the black box in his possession. (T. Suppression Hearing, p 87) The Trial Court stated that he could not determine whether the Defendant owned the box. The Court then stated that this gives the Defendant standing to question the search. (T. Suppression Hearing, p. 87)

The only officer, Nathan Jensen, who even testified that he saw the Defendant with the box in his possession was the third officer to enter in the house. (T. Suppression Hearing, p. 59) This Officer testified that he saw the Defendant sitting on the couch with what he called a black object in his left hand. (T. Suppression Hearing, p. 59) However, Officer Jensen's testimony is in conflict with the testimony of Officer Burnett who proceeded Officer Jensen into the premises. Officer Burnett

testified that he was the second individual to enter the house, being just behind Officer Hamblin. When he entered he screamed "Police search warrant, I want to see your hands. Get down on the floor." All the individuals cooperated and did what they were told. Officer Burnett then saw the Defendant laying on the floor in front of the couch. with his arms out to his side. Clearly, Officer Jensen was behind Officer Burnett. (T. Suppression Hearing, pg's 31-32) Officer Burnett did not testify that he ever saw the Defendant on the couch with the black box in his hand, it being only three to five seconds after entry before the Defendant was on the floor (T. Suppression Hearing, p 33)The Defendant denied to the police officers that the box was his. (T Suppression Hearing p. 40)

The Trial Judge in stating that it is clear that the Defendant had the box in his possession was mistaken as no officer ever testified to this. All Officer Jensen ever said was a black object was in the Defendant's hand. The box was several feet away from the Defendant when it was picked up by the Officer. When the Court choose to believe the testimony of Officer Jensen over Officer Burnett it was not a logical assumption.

The Utah Supreme Court held that suppression of evidence is an appropriate remedy for illegal police conduct only when the conduct implicates a fundamental

violation of a defendant's rights State v. Rowe. 850 P. 2d 427, 429 (Utah 1992). In the instant case there is a conflict between two police officers as to whether the Defendant had the box in his possession. The second officer on the scene testified that he did not see the Defendant have the box in his possession. In fact, he testified that he saw the Defendant lying on the floor with nothing in his hands. The third officer to enter the house was the only officer to testify that he saw the Defendant sitting on a couch with a black object in his hand.

With the conflict in the State's witnesses testimony as to whether the Defendant had the box in his possession the Trial Court committed error in its failure to suppress the testimony of the alleged possession of the box by the Defendant. The failure to suppress testimony of the Defendant's possession of the box was the only evidence in which the Trial Court could find the Defendant guilty of possession of a controlled substance, a second degree felony. This failure to suppress was the motivation for the Defendant to plead guilty to a second degree felony, possession of a controlled substance, rather than take the risk that a jury might have found him guilty of a first degree felony, possession of a controlled substance with intent to distribute.

CONCLUSION

STATE OF UTAH V CARPENTER
Case Number 990494-CA

The Defendant was denied effective assistance of counsel by his counsel not preparing and filing a suppression of evidence motion, as requested by the Defendant and not filing either a memorandum supporting the Defendant's pro se motion to suppress evidence obtained by reason of a search of the house or a reply memorandum to the State's memorandum in opposition to granting the motion to suppress evidence obtained by the search of the house. The Trial Court further violated the Defendant's fundamental rights by failing to suppress evidence that the Defendant had a black box in his hand, where the testimony of the police officer were in conflict as to whether the Defendant, in fact, did have the black box in his possession at the time of the search of the house.

DATED this 15th of December, 1999

MAURICE RICHARDS
Attorney for Defendant/Appellant

STATE OF UTAH V CARPENTER
Case Number 990494-CA

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Brief of Appellant was posted in the United States mail, postage prepaid, on this 15th day of December, 1999 and addressed to:

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In the Second District Court for Weber County

State of Utah

State of Utah Plaintiff vs Randolph Carpenter Defendant	Motion to Suppress Case No: 98-1903734 Judge Brent West

the defendant, by and through himself Randolph Carpenter here by move the above entitled Court to suppress any and all evidence obtained by searching his person and personal effects in the residence located at 2534 Orchard, Ogden Utah.

(1) the defendant claims that this search was in violation of his rights guaranteed by the 4th Amendment of the United States Constitution,

UNDER THE EXCLUSIONDRY RULE, WHEREAS, EVIDENCE IS INADMISSIBLE IN PROCEEDINGS IF IT IS SEIZED IN VIOLATION OF THE CONSTITUTIONAL PROTECTIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES.

RULE 403: EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME.

(A) ALTHOUGH RELEVANT, EVIDENCE MAY BE EXCLUDED IF ITS PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE, CONFUSION OF THE ISSUES OR MISLEADING THE JURY, OR BY CONSIDERATIONS OF UNDUE DELAY, WASTE OF TIME, OR NEEDLESS PRESENTATION OF CUMULATIVE EVIDENCE. Utah v Gallegos, 1985 UT 220, 712 P2d 207

(2.) THE DEFENDANT ARGUES THAT THE CONTENT OF THE SEARCH WARRANT AS PRESENTED AND SIGNED BY TWO DIFFERENT JUDGES ON TWO SEPERATE DATES SPECIFYING CONTRASTING ISSUANCES OF ITS AUTHORITY, IS UNCLEAR, CONFUSSING AND ERRONIOUS.

IT TENDS TO REFLECT ITS CONFUSSING AUTHORITY AND HAS THE TENDENCY OF BEING CONTRADICTORY, RECKLESS AND ALSO A VIOLATION OF 77-23-212; WHEREAS:

(B) ANY UNLAWFUL SEARCH OR SEIZURE SHALL BE CONSIDERED SUBSTANTIAL AND IN BAD FAITH IF THE WARRANT WAS OBTAINED WITH MALICIOUS PURPOSE AND WITHOUT PROBABLE CAUSE OR WAS EXECUTED MALICIOUSLY AND WILLFULLY BEYOND THE AUTHORITY OF THE WARRANT OR WITH UNNECESSORY SEVERITY.

(3) THERE IS NOTHING IN ANY OF THE POLICE REPORTS THAT INDICATES NEITHER AGENT BURNETT NOR AGENT

defendant to remove any articles, papers or currency from his person which is in violation of the defendants Rights under the United States Constitution and the constitution of Utah, Article I, Section 14. Utah v Gallegos, 1985 UT. 220. 712 P 2d 207

(4) the defendant argues that since Agent Burnett nor Agent Jensen, or Hamblin did not recieve consent to search defendant, and there is no such documentation or statements to show that consent was ever given by the defendant, the contents recieved from the defendants person should be suppressed according to the Constitution of Utah Article I, Section 14, and of the fourth amendment of the United States Constitution. State v Thurman 846 P 2d 1256, 1266 (Utah 1993) State v Robinson 797 P 2d 431 437 Utah App 1990)

(5) Although the defendant was "handcuffed" immediately after the police entered the apartment, there was never any indication that he (defendant) was under arrest. In all police reports the mention of all persons being secured seems to indicate that all persons were in fact "handcuffed" in order to prevent any one from destroying evidence, but not to the point of arresting.

Since the defendant was not questioned while handcuffed, it is unclear whether he had been deprived of his constitutional Rights or deprived of his constitutional rights when he was searched without consent, not knowing whether he was in fact under arrest. Since no officer felt

their failure to do so would seem to require the court to suppress evidence from the defendants person that was clearly obtained without the defendants consent.

As stated by Lord Sankey: "It is not admissible to do a great right by doing a little wrong.... It is not sufficient to do Justice by obtaining a proper result by irregular or improper means. (Miranda vs Arizonia, 384 US 436 16 L ed 2nd 694, 86 S ct 1602.) Also in Mapp vs Ohio, 367, US 643, 6 L ed 1081, 81 St 1684, "It could reasonably be argued that the methods employed to obtain evidence were such as to offend a sense of Justice.

In their zealous act to seize evidence against the defendant whom they had already presumed to be the perpetrator upon their entrance, Agent Burnett, Agent Jensen and Agent Hamblin disregarded the defendants Rights.

In Mapp vs Ohio it is apparent that police went beyond the constitutional Rights of Ramson whereas the search was not protected by the defendants Rights or Reasonable expectation of Privacy.

It is equally well settled that when a agent conducts a search in violation of a defendants' Forth Amendment Rights, any evidence seized during the search cannot be admitted in a criminal trial against that defendant.

Kate v. United States, 389 U.S. 347, 357, 88

(6) the defendant argues that there is no sufficient evidence that supports any claim that the defendant resided at 2534 Orchard nor is there any evidence to substantiate probable cause to search and seize any material or currency from the defendants person without Consent.

In Boyd vs United States, 116 US 616, 630, 29 L ed 746, 751, 6 S Ct. 524 (1886), considering the Fourth and Fifth amendments as running "almost into each other" on the facts before it, this court held that the doctrines of those amendments "apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of those admendments.

In Weeks vs United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177 (1914), stated that "the fourth Amendment... put the Courts of the United States and Federal officials, in

LIMITATIONS AND RESTRAINTS [AND] .... FOREVER SECURE[d] THE PEOPLE, THEIR PERSONS, HOUSES, PAPERS AND EFFECTS AGAINST ALL UNREASONABLE SEARCHES AND SEIZURES UNDER THE GUISE OF LAW .... AND THE DUTY OF GIVING TO IT FORCE AND EFFECT IS OBLIGATORY UPON ALL ENTRUSTED UNDER OUR FEDERAL SYSTEM WITH THE ENFORCEMENT OF THE LAWS. At pp 391, 392 [367 US-648] Specifically dealing with the use of the evidence unconstitutionally seized, the court concluded:

"If LETTERS AND PRIVATE DOCUMENTS CAN THUS BE SEIZED AND HELD AND USED IN EVIDENCE AGAINST A CITIZEN ACCUSED OF AN OFFENSE, THE PROTECTION OF THE FOURTH AMENDMENT DECLARING HIS RIGHT TO BE SECURE AGAINST SUCH SEARCHES AND SEIZURES IS OF NO VALUE, AND, SO FAR AS THOSE THUS PLACED ARE CONCERNED, MIGHT AS WELL BE STRICKEN FROM THE CONSTITUTION. THE EFFORTS OF THE COURTS AND THEIR OFFICIALS TO BRING THE GUILTY TO PUNISHMENT, PRAISEWORTHY AS THEY ARE, ARE NOT TO BE AIDED BY THE SACRIFICE OF THOSE GREAT PRINCIPLES ESTABLISHED BY YEARS OF ENDEAVOR AND SUFFERING WHICH HAVE RESULTED IN THEIR EMBODIMENT IN THE FUNDAMENTAL LAW OF THE LAND. At p. 393

THERE WERE NO RECIEPTS FOR RENT OR ANY RENTAL AGREEMENTS OR SIGNED DOCUMENTS TO PROVE OR SUGGEST THE DEFENDANT WAS A RESIDENT of 2534 ORCHARD, NOR ANY OTHER MATERIAL FACT THAT SHOWED CAUSE TO OTHER WISE VIOLATE THE CONSTITUTIONAL RIGHTS OF THE

(7) In the case of Agent Jensen's report and in his actions throughout this investigation, it is evident that he (Agent Jensen) alone took it upon himself to report the defendant's address as 2534 Orchard in his written Report without any proof which in fact showed Agent Jensen's disregard for the truth.

Agent Jensen's actions in this particular instance went beyond his legal authority and consequently violated the defendants rights as well as the Fourteenth Amendment Constitutional Rights of the United States, due process of Law.

to not abide by the constitutional rights of the United States, or the constitution of Utah, and to simply ignore the facts of this investigation would mean to deny the Rights of any person accused of a crime.

thus in the year 1914, in the Weeks case, a court "For the first time" held that "in a Federal prosecution the fourth Amendment barred the use of evidence secured through an illegal search and seizure." Convictions by means of unlawful seizures and enforced confessions ... should find no sanctions in the Judgements of the courts.

the defendants Constitutional Rights against illegal search and seizure have been violated and the only alternative of the court is to suppress the evidence obtained from the defendents person.

(8) the defendant further argues that according to the affidavit for the search warrant, Agent Jensen sights various grounds for its issuance.

(i) the affiant researched OPD intelligence Records and found that a narcodic arrest had been made on 1-29-97 at 2534 Orchard, apartment number #1.

(ii) Agent Donehoo and other agents had done surveillance at the address of 2534 Orchard #1 on 03-22-98 and had seen numerous persons go in and out of the residence for short term stays that the affiant knew from experience was the type of traffic indicative of a residence where drugs were sold.

(iii) In March of 1998 Agent Donehoo made a controlled purchase of crack cocaine using a confidential informant, here after referred to as CI #1, who purchased a half gram of Crack Cocaine from 2534 Orchard #1.

(iv) On 8-7-98 Agent Burnett and myself (Jensen) were flagged down by an unwitting informant that offered to take us (Agents) to an address in the 2500 block of Orchard and purchase crack cocaine. they drove the unwitting to the 2500 block of Orchard where he/she was given twenty

him/she enter the front door of 2534 Orchard #1. the unwitting returned within two minutes and gave Jensen a off white rock (approx .½ gram) that field tested positive for cocaine.

(9) the defendant argues that because there is no indication that these arrest in any way involved him, these particular incidents and assertions can be defined within the context of the exclusionary rule, 403, Exclusion of Relevant Evidence:

Although Relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confussion of the issues or misleading the Jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

the mere affirmation that OPD records showed that a narcodic arrest was made at 2534 Orchard a year ago (1-29-97) or the incidents that took place on (3-29-98) or in March 1998 (no date given here) or (8-7-98) does not imply or mention that the defendant was involved or even a suspect, or ever lived at 2534 Orchard apartment #1.

the defendant argues that his constitutional rights

being violated here in that the states case and the affiants probable cause for the issuance of a search warrant is constitutionally invalid and its probative value is substantially being outweighed by the danger of unfair prejudice, confussion of the issues and misleading the facts, that will be presented to a jury or judge.

the fact that the CI #1 had made several narcodic buys in the past (as mentioned in Jensens affidavit) that resulted in the arrest and conviction of other suspects is insufficient for probable cause, or to go beyond the authority of the search warrant to obtain evidence against the defendant, or to prosecute the defendant in this case.
the credibility of CI #1 has no barring in this case because it is not clear who the CI #1 purchased the crack cocaine from, or no mention of names including the defendants name, or that CI #1 knows for a fact who resides at 2534 Orchard apartment 1#. since the CI #1 did not at any time mention who the purchase was made from, there is no proof the CI #1 purchased crack cocaine from an unknown source, or known source.
the issues raised here are issues argued in Aguilar vs Texas 1964. sct. 1210, 378 US. 108, 84 S. Ct. 1509, 12. L. Ed. 2d 723,

may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and some of the underlying circumstances from which the affiant concluded that the informant, whose identity was not disclosed, was creditable or his information reliable. Giordenello v United States 357 US. 480, followed Pp 110-115

the fact that the defendant was in the apartment at 2534 Orchard apartment #1, when the search warrant was served and executed by Agent Jensen does not constitute intent. when in fact the defendant is not a resident.

When currency was removed from the defendants Right front pocket. there is no mention in any of the police reports that the defendant was under arrest at that point (even though defendant was handcuffed) or whether defendant was mirandized or gave consent to search his person in an apartment #1 2534 Orchard in which the defendant was not a resident.

there was no probable cause to reach into the pocket of the defendant without consent, and this is clearly a violation of the defendants constitutional

AND BEYOND THE AUTHORITY OF THE SEARCH WARRANT.

IN MAPP VS OHIO 367, US 643, 6 L. Ed 2d 1081, 81 S Ct 1684. THE IGNOBLE SHORTCUT TO CONVICTION LEFT OPEN TO THE STATE TENDS TO DESTROY THE ENTIRE SYSTEM OF CONSTITUTIONAL RESTRAINTS ON WHICH THE LIBERTIES OF THE PEOPLE REST.

HAVING ONCE RECOGNIZED THAT THE RIGHT TO PRIVACY EMBODIED IN THE FOURTH AMENDMENT IS ENFORCEABLE AGAINST THE STATES, AND THAT THE RIGHT TO BE SECURE AGAINST RUDE INVASIONS OF PRIVACY BY STATE OFFICERS IS, THEREFORE, CONSTITUTIONAL IN ORIGIN, WE CAN NO LONGER PERMIT THAT RIGHT TO BE AN EMPTY PROMISE. BECAUSE IT IS ENFORCEABLE IN THE SAME MANNER AND TO LIKE EFFECT AS OTHER BASIC RIGHTS SECURED BY THE DUE PROCESS CLAUSE, WE CAN NO LONGER PERMIT IT TO BE REVOCABLE AT THE WHIM OF ANY POLICE OFFICER WHO, IN THE NAME OF LAW ENFORCEMENT ITSELF, CHOOSES TO SUSPEND ITS ENJOYMENT. OUR DECISION, FOUNDED ON REASON AND TRUTH, GIVES TO THE INDIVIDUAL NO MORE THAN THAT WHICH THE CONSTITUTION GUARANTES HIM, TO THE POLICE OFFICER NO LESS THAN THAT TO WHICH HONEST LAW ENFORCEMENT IS ENTITLED, AND, TO THE COURTS, THAT JUDICIAL INTEGRITY SO NECESSARY IN THE TRUE ADMINISTRATION OF JUSTICE.

(10) THERE IS NO CONNECTION BETWEEN THE INFORMATION PROVIDED BY THE AFFIANT THAT IS IN ANY WAY CONNECTED WITH

Court Records will show that the defendant was in the Weber County Correctional Facility from 12-17-97 to 3-20-98 and transfered to Jail diversion from 3-20-98 to 5-29-98 as ordered by Judge Brent West.
the defendant was returned to Weber County Correctional Facility 6-12-98 and released 7-2-98 and resided at 2770 Grant.
All papers that were seized from the defendant by Agent Jensen bare the address 2770 Grant, which include the defendants identification, Flaggers certificate and titles to the defendants car along with other papers the defendant needed to get his car out of the impound located at Ogden Auto Body 2050 Wall Ave.
None of these papers seized by Agent Jensen have the address 2534 Orchard.
the unlawful seizure of effects, papers and currency seized by Agent Jensen belonging to the defendant from the forced entrusion at 2534 Orchard Apartment #1 was in violation of the Fourth and Fourteenth Amendment Constitutional Rights of the defendant.
the defendant seeks to have this court suppress all the evidence unlawfully seized from the defendant and all evidence seized in violation of the defendants Constitutional Rights under the Fourth, Fifth and Fourteenth Amendments.

(11) the phrase "no person named (only the premises) is unclear as to what is meant and allows the opportunity

AUTHORITY AND CONTROL OVER THE LEGAL RIGHTS of the DEFENDANT TO NOT HAVE THE RIGHT TO CONSENT to A SEARCH of his PERSON OR TO ALLOW AGENT JENSEN THE PLEASURE of going shopping FOR A SUSPECT.

THE FACT THAT ALL OTHER PERSONS IN THE APARTMENT AT 2534 ORCHARD NUMBER (1) WERE ASKED IF THEY COULD BE SEARCHED CLEARLY SHOWS THAT THE DEFENDANT HAD IMMEDIATELY BECOME THE TARGET of AGENT JENSEN'S INVESTIGATION AND ALL EVIDENCE WAS OBTAINED to SUGGEST AS MUCH, WITH DISREGARDS FOR THE CONSTITUTIONAL RIGHTS of THE DEFENDANT.

AS STATED IN THE WEEKS CASE, IF EVIDENCE SEIZED IN VIOLATION of the FOURTH AMENDMENT CAN BE USED AGAINST A CITIZEN, SUCH SEARCHES AND SEIZURES ARE of NO VALUE AND .... MIGHT AS WELL BE STRICKEN FROM THE CONSTITUTION. 232 U.S. AT 393. MAPP VS OHIO 367 U.S. 643, 6 L.ED 2d 1081, 81 S CT 1684. THIS ALSO APPLIED IN KATZ VS UNITED STATES, 389 U.S 347, 357, 88 S.CT 507, 514, 19 L.ED 2d 576 (1967). UNITED STATE VS MAYER, 620 F. SUPP. 249 (D.C. UTAH 1985) "WHEN SEARCHES ARE CONDUCTED IN VIOLATION of the FORTH AMENDMENT ANY EVIDENCE SEIZED DURING THE SEARCH CANNOT BE ADMITTED IN A CRIMINAL TRIAL AGAINST THE DEFENDANT.

CONCERNING PERKES ARE UNSUBSTANTIATED BY HER STATEMENT THAT SHE WAS AT THE ORCHARD RESIDENCE TO PURCHASE AND USE CRACK COCAINE.

IN NEITHER AGENT JENSEN'S REPORT NOR AGENT BURNETTS REPORT OR AGENT HAMBLIN'S REPORT, NONE of which THERE IS ANY PHYSICAL EVIDENCE to SUGGEST THAT PERKES HAD EITHER PURCHASED, POSSESSED OR SMOKED ANY CRACK OR ROCK, the VALIDITY of HER STATEMENT THAT SHE PURCHASED A ROCK FROM CARPENTER. BUT HAD NO EVIDENCE to SUPPORT the STATEMENT AS A FACT, TENDS to IMPLY the PROBABILITY that WHAT SHE STATED IS IN ITSELF HEARSAY WITHIN HEARSAY.

JENSEN IS ONLY REPEATING A STATEMENT MADE BY PERKES WHICH IS NOT SUPPORTED BY A FACT.

IN Utah vs FREDERICK RAY SIBERT, 1957 UT. 32, 310, P2d 388, 6 Utah 2d 198, WORTHEN, Justice (CONCURRED AND DISSENTED) "IT IS A blind spot FREAK that JUSTIFIES the ADMISSION of SUCH HEARSAY EVIDENCE ON the GROUNDS that OFFICER FERRIN WAS TESTIFYING to A FACT.... the FACT THAT BUTTER told officer FERRIN SOMETHING!

(A) IN this PARTICULAR PROGNOSIS, the PROSECUTOR WOULD ONLY BE INTERESTED IN the STATEMENT by JENSEN, which would only SERVE to "REHABILITATE" A STATEMENT MADE by PERKES, which IN ANY EVENT IS still NOT A FACT.

(B) A PERSON UNDER SUCH CIRCUMSTANCES AS PERKES

of EXCITMENT CAUSED by the EVENTS AND CONDITIONS OR ACTIONS of the POLICE WITHIN WHICH they (PERKES) FIND themselves. PRESENT.

(C) SINCE there IS NOthing to PROVE BEYOND REASONABLE doubt that ANY PURCHASE WAS RECIEVED FROM the DEFENDANT, PERKES STATEMENT IS TANTAMOUNT to A STATEMENT that WOULD BE MADE WHILE PRESENT DURING the EXECUTION of A WARRANT AND the CONDUCT by the POLICE, whether SLIGHT OR FREQUENT AND AMOUNTED to A form of COERCION.

(D) HOWEVER, PERKES HAD NO PHYSICAL EVIDENCE SHE PURCHASED CRACK, OR that SHE WAS high FROM USING CRACK OR SMOKED CRACK COCAINE AND therefore CAN NOT CORROBERATE ANY STATEMENT SHE MAY HAVE GIVEN.

(E) PERKES STATEMENT that SHE PURCHASED AND USED CRACK COCAINE WOULD ONLY SERVE to PROVE by SELF INCRIMINIATION that SHE'S IN the COMMISSION of COMMITTING A CRIME HERSELF which CONSTITUTES A CRIMINAL ACT. Utah v BERG (1980) UT. 141, 613 P. 2d 1125 - STATE v KASAI 27, Utah 2d 326, 495 P 2d 1265 (1972) Utah v Comish 1977 UT. 47 560 P.2d 1134

(F) FURTHERMORE, CORROBORATING EVIDENCE MUST IN ITSELF CONNECT the PERSON with the COMMISSION of the OFFENSE AND BE CONSISTANT with his INNOSENSE. SUCH IS NOT the CASE with WHAT PERKES STATEMENT IMPLIES BECAUSE there IS NO EVIDENCE CONSISTANT with WHAT PERKES CLAIMS, SINCE INFACT PERKES

to show she purchased anything from the defendant.

(G) Agent Hamblin in his report states that he searched Perkes and her purse and there was no crack Rock Either on her person or in here purse.

(H) the defendant argues that when the total picture of events that involved Perkes is viewed, the court will discover that what takes place here is that Agent Hamblin serves as a conduit to the statement relayed to him by Perkes and Agent Jensen serves as a conduit to the statement by Agent Hamblin concerning the statement by Perkes who only states that she purchased something that was never found on her person nor in here purse. (See Utah vs Sibert 1957 Ut. 32, 310 P2d 358, 6 Utah 2d 198) Evidence of this nature that is not supported by Facts is evidence that is inconsistant with a statement made by a witness or piarty and does not corroborate any inference that the person making the statement was telling the truth to police who might be overzealous in trying to obtain evidence to obtain a conviction.
Agent Hamblin And Agent Jensen lacked personal Knowledge or evidence that what Perkes claims she purchased from the defendant is true, since in fact Perkes was not high on crack Rock or had no Contraband as reported by Agent Hamblin which in

(13) Agent Jensen, Agent Hamblin, Agent Burnett and Agent Hanson, went beyond the authority of the search warrant and the laws of the constitution and the constitutional rights of the defendant. It is the duty of courts to be watchful for the constitional Rights of the citizen, and against any stealthy encroachments thereon.

Agent Jensen states in his report that he saw the defendant dive to the floor while holding a black box in his left hand. But at no time in Agent Jensen's report does he state that he actually saw the defendant throw, toss or get rid of this black box during the initial and curcial moments when exigent circumstances exsisted according to Agent Hamblin who in his report states: "I could see a black male peeking through the front window blinds as we approached. I was aware that the residence was a "crack cocaine house" and knew that crack can easily be disposed of. I elected to get into the home as quick as possible as we had been detected.

Agent Hamblin however, does not indicate that he either saw the defendant with a black box in his hand, or that he saw the defendant throwing a black box, although Hamblin, nor Burnett mention what only Agent Jensen seems to have saw from behind both agents.

dive to the Floor with a black box and that he located the black box, but does not state that he saw the black box being thrown

Agent Jensen has portrayed himself as the anchorman in his significance as the designated Finder in that he has used his authority as an officer to implicate the defendant in his fabricated version that not only does the defendant live at 2534 Orchard, but being the third agent in behind Burnett who did not see the defendant with a black box, or Agent Hamblin who did not see a black box in defendants hand Agent Jensen himself saw what no one has before him saw.

(14) In Aquilar v Texas 1964. SCT. 1210, 378 U.S. 108, 84 S. Ct 1509, 12 L. ed 2d 723, Justice Jackson states. "the point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies Law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being Judged by the officer engaged in the often competitive enterprise of ferreting out Crime. the defendant thus argues that his constitutional Rights were violated when officers cuffed him and searched his pockets and seized 182.00 dollars with out ever once advising defendant of his Rights. consent to search. in a apartment in

(15) the defendant argues that if the state has indeed based its case upon the actions and events reported by Agent Jensen, Agent Burnett, it has refused to seek Justice according to the constitution, it has turned a blind eye to the overwhelming fact that Justice will be logical, with respect for the truth, and concern for the rights of the defendant, the Fourth Amendment of the United States.

Any reasonably minded Judge should reasonably acknowledge the seriousness of the Constitutional issues violated in this case.

the term "unreasonable" as defined by the Fourth Amendment of the United States is a key word to describe the prudence with which we the people must protect our selves against any malicous, Reckless, disregard for the truth beyond reasonable doubt.

While the defendant must defend his rights and his innosense against an agent who claims to have seen what no other agent did not report they saw, even though they entered 2534 Orchard before Agent Jensen, it is not possible to believe the Justice system and the courts could possibly ignore logic, the integrity for truth or the provisions to equality, fairness and honesty provided in the laws and the Fourth, Fifth, and Fourteenth Amendments.

(A) THERE IS NO EVIDENCE THAT THE DEFENDANT LIVED AT 2534 ORCHARD.

(B) THE DEFENDANT DOES NOT LIVE AT 2534 ORCHARD

(C) THERE WAS NO CONSENT TO SEARCH THE DEFENDANT.

(D) THERE WAS NO POSSESSION OR INTENT

(E) PERKES did NOT HAVE ANY EVIDENCE SHE bought ANYTHING FROM DEFENDANT

(F) THERE WAS NO AUTHORITY TO GO BEYOND THE AUTHORITY of THE SEARCH WARRANT.

(G) THE WARRANT CLEARLY STATES "NO PERSON NAMED (ONLY THE PREMISES)

(H) THE DEFENDANTS CONSTITUTIONAL RIGHTS WERE VIOLATED.

(16) THE DEFENDANT ARGUES THAT AGENT JENSEN HAS MADE AN UNREASONABLE ATTEMPT TO PROPAGATE THE FACTS BEYOND REASONABLE AUTHORITY of A FAULTY WARRANT TO PROPENSITIZE AND JEOPARDIZE THE CONSTITUTIONAL RIGHTS of THE DEFENDANT WITHOUT REGARDS TO THE FOURTH AMENDMENT, WITHOUT REGARDS TO CONSENT TO A SEARCH of HIS PERSON, AND WITHOUT REGARDS FOR THE UTAH RULES of EVIDENCE.

(17) FINALLY, IF INDEED THE WORDING of THE SEARCH WARRANT SUGGEST THAT AUTHORITY TO GO BEYOND THE CONSTITUTIONAL RIGHTS of A PERSON TO SEARCH AND SEIZE PROPERTY FROM HIS POCKETS WITHOUT CONSENT OR THAT ANY ACT TO ACQUIRE EVIDENCE IS AUTHORIZED BY THE WORDING of THE SEARCH WARRANT, OR THAT THE WORDING ALLOWS THE CONDUCT of

the agents in this investigation to use their own discretion as to what authority they deem necessary whether illegal or not to acquire evidence, the de-fendant argues that such careless use of authority is in violation of the constitution, the fourth, fifth and fourteenth Amendments.
the defendant does not reside at 2534 orchard and there was no probable cause to search him without consent.

It is the motion of the defendant that all evidence against the defendant be suppressed and that the charges of possession with intent be dropped at this time, and that all his belongings from his person (182.00 dollars) and all other Items with the Address 2770 Grant be returned to him. that any or all parts of this motion to suppress be granted according to the violations of his Constitutional Rights

Florence Petersen
Notary Public • State of Utah
2546 Kiesel Ave
Ogden UT 84401
Comm. Exp. 1-2-2000

Dated this 17th day of November and the year 1998

11-17-98

Randolph Carpenter
Randolph Carpenter
Self Represented

BRENDA J. BEATON, UBN 6832
WEBER COUNTY ATTORNEY'S OFFICE
2380 WASHINGTON BLVD., 2ND FLOOR
OGDEN, UTAH 84401
TELEPHONE: (801) 399-8377

IN THE SECOND DISTRICT COURT OF WEBER COUNTY,
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. RANDOLPH CARPENTER Defendant.	STATE'S BRIEF OPPOSING DEFENDANT'S MOTION TO SUPPRESS Case No. 981903734 Judge MICHAEL J. GLASMANN

Brenda J. Beaton, acting on behalf of the State of Utah, requests this Court deny Defendant's Motion to Suppress. The search of the black box was pursuant to a valid search warrant and did not extend beyond the scope of the warrant as an illegal search of the Defendant.

STATEMENT OF FACTS

On August 13, 1998, a search warrant was issued for a residence located at 2534 Orchard because agents of the Weber/Morgan Narcotics Strike Force believed cocaine was being sold there. The warrant did not list any particular people to be searched.

Agent Troy Burnett ("Agent Burnett") was familiar with the layout of the home because he had been to the apartment on a prior occasion. Before executing the search warrant, the agents reviewed the layout of the home and set up a general plan for entering the apartment.

When the agents executed the search warrant on August 14, 1998 at approximately 9:30 p.m., Agent Shawn Hamblin ("Agent Hamblin") noticed an African-American male (later identified as the Defendant) peeking out the livingroom window. Agent Hamblin alerted the other agents that someone in the house had seen them approaching. Agent Hamblin quickly approached the front door. He kicked the door while Agent Burnett used the battering ram to break down the door. As the agents entered the home, they announced that they were police officers and ordered all of the people in the home to the ground. Agent Hamblin entered the apartment first and immediately went toward the rear of the apartment where the bathroom and bedroom are located. Agent Burnett's attention was directed at the individual seated on the couch that was injured by the door when it was forced open. Agent Nate Jensen's ("Agent Jensen") attention was directed to another couch where the Defendant had been sitting. Agent Anthony Hanson ("Agent Hanson") went directly to the back of the apartment to deal with the individual in the bathroom.

While the Defendant was in the process of getting on the ground, Agent Jensen noticed a black box in his left hand. Agent Jensen saw the Defendant throw the small black box out in front of him. The black box was located approximately one to two feet in front of the Defendant's head as he was laying on the floor. Agent Jensen called for Agent Burnett who was the designated finder for that search. Agent Burnett noted the box was approximately one foot in front of the Defendant's outstretched arms. There were not any other people in the general area. Prior to the search of the box, the Defendant stated the box was not his. Agent Burnett opened the box and found it contained various yellow rocks that were later determined to be cocaine. After the search of the box, the Defendant again told Agent Burnett "that fucking box is not mine." While the Defendant was being booked at the Weber County Jail, he again denied ownership of the box.

The agents believed the Defendant lived at the home because the Defendant's name was found on written documents in the bedroom and he told them he was living there. It was not until the Defendant was booked in the jail that he claimed to have a different address which was consistent with some identification found on him. None of the other individuals found in the home live at the residence.

Agent Hamblin interviewed Perkes at the home. She stated that she lived on Orchard and had come to the house to purchase and use crack cocaine. She told Agent Hamblin that she purchased a rock of cocaine from a male in the house named "Randolph." The Defendant is the only person in the home with the name "Randolph."

Agent Burnett spoke with Quinton Jones. Jones stated that he bought two rocks from the Defendant shortly before the agents entered the home.

ARGUMENT

I. THE SEARCH OF THE DEFENDANT'S BLACK BOX WAS PROPER AND WAS NOT BEYOND THE SCOPE OF THE WARRANT BECAUSE THE BOX WAS NOT LOCATED ON THE DEFENDANT'S PERSON AND THEREFORE FELL WITHIN THE SCOPE OF THE SEARCH WARRANT.

The Fourth Amendment assures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, . . ." U.S. CONST. amend IV (emphasis added). The purpose of the limitations of the Fourth Amendment is to "impose limits on search and seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976). "[W]hat the Constitution forbids is not all searches and seizures, but

unreasonable searches and seizures." Elkins v. United States, 364 U.S. 206, 222 (1960). The test of whether a search and seizure is "reasonable" is "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. 1, 20 (1968). The search itself must be conducted in a reasonable manner and must be appropriately limited in scope and intensity. See Id. at 17-18 ("a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.")

In United States v. Medlin, 842 F.2d 1194 (10th Cir. 1988), the Tenth Circuit stated that "[w]hen law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant." Id. at 1199. See also, Waller v. Georgia, 467 U.S. 39, 44 n.3 (1984); United States v. $149,442.43 in U.S. Currency, 965 F.2d 868, 875 (10th Cir. 1992). Therefore, the salient question is whether the search of the black box "grossly exceeded" the scope of the search warrant. It did not.

The search warrant allowed for the search of cocaine and the materials used for packaging cocaine. The black box could obviously contain cocaine or paraphernalia. Although the warrant did not specifically request permission to look in small jewelry boxes, it was reasonable at the time of the search that the box may contain the very substance the search warrant was intended to find. Therefore, the search of the box did not "grossly exceed" the scope of the warrant.

Furthermore, the box was found on the floor of the residence. While it is true that the box was seen in the Defendant's hand when the officers entered the home, it was not on his person when the search of the home began. The Utah Court of Appeals, following several other jurisdictions held

that where "[a] purse was not in the defendant's physical possession when it was searched, and because the purse could have contained items sought in the search warrant, the purse fell within the scope of the premises search warrant." State v. Jackson, 873 P.2d 1166, 1169 (Utah Ct. App. 1994). The Jackson court followed the Pennsylvania Supreme Court when it stated:

> Clearly, the police are not prohibited from searching a visitor's personal property (not on the person) located on the premises in which a search warrant is being executed when that property is part of the general content of the premises and is a plausible repository for the object of the search. Otherwise, it would be impossible for police to effectively search a premises where visitors are present because they would not know which items, clothing and containers could be searched and which could not be searched.

Id. at 1168 (quoting Commonwealth v. Reese, 549 A.2d 909, 911 (Pa. 1988).

In this case, it was not known whether the Defendant resided at the home where the search warrant was to be executed. The box was a container which reasonably could hold cocaine. The box was not on the Defendant's person. The Defendant denied any claim to the box. Therefore, it was within the scope of the warrant to search the box.

II. IF THE DEFENDANT DOES NOT LIVE AT THE HOME OR HAVE ANY INTEREST IN THE BLACK BOX THEN HE SHOULD NOT BE PERMITTED TO CONTEST THE SEARCH.

The Defendant can not contest the search of the home or the black box if he lacks standing. According to the Defendant's motion, he has no interest in the property. The applicable case law dictates that where a defendant has neither a proprietary/possessory interest, nor an expectation of privacy in the thing searched, there is no standing to challenge the police action under either a state or federal analysis. In Rakas v. Illinois, the Supreme Court stated that

> [a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. . . [I]t is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the [exclusionary] rule's protections.

Rakas v. Illinois, 439 U.S. 128, 134 (1978). The 10th Circuit has also addressed the issue.

> The right (or standing) to contest the constitutionality of a search and to argue for exclusion at a criminal trial of evidence obtained as a result of the search is subsumed under substantive Fourth Amendment doctrine. . . The capacity to claim the Fourth Amendment's protection depends on whether the person claiming it has a legitimate expectation of privacy in the invaded place.

United States v. Moffet, 84 F.3d 1291, 1293 (10th Cir. 1996). The Tenth Circuit has also addressed the issue of abandonment. The Court stated that "[a]bandonment is akin to the issue of standing because a defendant lacks standing to complain of an illegal search or seizure of property which has been abandoned." United States v. Garzon, 119 F.3d 1446, 1449 (10th Cir. 1997) (citations omitted). The Court in Garzon further found that the "test for abandonment subsumes both a subjective and an objective component." Id. (citing United States v. Austin, 66 F.3d 1115, 1118-19 (10th Cir. 1995). The Court stated that in order to have abandonment, a defendant must either "(1) explicitly disclaim[] an interest in the object, or (2) unambiguously engage[] in physical conduct that constitute[s] abandonment." Garzon, 119 F.3d at 1452.

In the present case, the Defendant's actions fit both situations discussed in Garzon. As the Agents entered the home, the Defendant threw the box. This fits the "physical conduct" requirement of Garzon. The Defendant on at least three different occasions disclaimed any ownership of the box. Under either standard, the Defendant clearly abandoned any interest in the black box. The police were justified in searching the box as part of the premises which fell within the scope of the search warrant.

CONCLUSION

The search warrant provided for a search of the premises of the home where the Defendant was located. Subsequently, the black box the Defendant had thrown when the agents came into the home was search and found to contain cocaine. The search of the box was permissible pursuant to the warrant. Furthermore, the Defendant does not have standing to contest the search of a box if he does not live at the home or have any possessory/proprietary interest in the home. His actions indicate he abandoned any interest he wanted to claim to the property when the tossed the box.

WHEREFORE, the State urges this Court to deny the Defendant's Motion to Suppress evidence.

DATED this 8th day of ~~January~~ Feb., 1999.

Brenda J. Beaton

BRENDA J. BEATON
Deputy Weber County Attorney

CERTIFICATE OF DELIVERY

This is to certify that a true and correct copy of the foregoing memorandum was hand delivered or mailed, postage prepaid, to:

JOHN CAINE
Attorney for Defendant
2568 Washington Blvd., Suite 203
Ogden, Utah 84401
(801) 392-8247

DATED this 8th day of ~~January~~ Feb. 1999.

Brenda J. Beaton

OGDEN, UTAH APRIL 7, 1999

MR. LAKER: YOUR HONOR, WE CAN TO NUMBER 42, RANDOLPH CARPENTER.

THE COURT: OKAY.

MR. LAKER: THIS IS MR. CARPENTER, YOUR HONOR. I'M STANDING IN FOR MR. CAINE WHO WORKED OUT A NEGOTIATION IN THIS MATTER. IT'S MY UNDERSTANDING THAT THE STATE WILL BE AMENDING THE CHARGE, THE POSSESSION OF A CONTROLLED SUBSTANCE CHARGE, THAT'S WITH INTENT, THEY'LL BE AMENDING THAT TO A POSSESSION OF CONTROLLED SUBSTANCE, SECOND DEGREE FELONY AND HE'LL PLEAD GUILTY TO THAT AND TO AN AMENDED THEFT CHARGE, CLASS-A MISDEMEANOR.

THE COURT: OKAY.

MR. LAKER: AND HE'LL PLEAD GUILTY TO THOSE. IN ADDITION TO THAT, YOUR HONOR, THERE IS A -- THE STATE HAS AGREED TO REMAIN SILENT AT SENTENCING. AND SPECIFICALLY, WE ARE RESERVING OUR RIGHT TO APPEAL THE COURT'S DECISION ON THE SUPPRESSION MOTION.

THE COURT: SO IT'S A SERY PLEA, IS THAT CORRECT?

MR. LAKER: THAT'S CORRECT.

THE COURT: AND THE STATE'S AGREEING TO THAT?

MS. BEATON: WE ARE.

THE COURT: ALL RIGHT. MR. CARPENTER, DO YOU UNDERSTAND WHAT'S BEEN EXPLAINED TO ME?

MR. CARPENTER: YES.

TO THAT CHARGE, SIR, HOW DO YOU PLEAD?

MR. CARPENTER: GUILTY.

THE COURT: AND DOES THE STATE HAVE A MOTION ON THE THIRD DEGREE FELONY?

MS. BEATON: WE'D MOVE TO AMEND ON THE THIRD DEGREE FELONY FROM A THIRD DEGREE FELONY TO A CLASS-A MISDEMEANOR BASED ON THE VALUE.

THE COURT: I'LL GRANT THAT MOTION. WILL AMEND IT TO REFLECT A CLASS-A MISDEMEANOR. TO THAT CHARGE, SIR, HOW DO YOU PLEAD.

MR. CARPENTER: GUILTY.

THE COURT: ALL RIGHT. WE'LL REFER THE MATTER OVER TO THE ADULT PROBATION AND PAROLE FOR PRESENTENCE REPORT. WE'LL CONTINUE SENTENCING ON THIS MATTER UNTIL MAY --

PROBATION OFFICER: IS MAY 12TH A GOOD DAY, YOUR HONOR?

THE COURT: YEAH, WE CAN DO THIS ON MAY 12TH. ALL RIGHT. MAY 12TH, 9:00 O'CLOCK.

MS. BEATON: YOUR HONOR, THERE'S A STATEMENT IN ABEYANCE OF PLEA --

MR. LAKER: WE DO HAVE A STATEMENT IN ADVANCE OF PLEA, YOUR HONOR, IF WE MIGHT APPROACH THE BENCH.

THE COURT: OKAY. YOU GONE OVER THIS, MR. CARPENTER? YOU'VE READ IT, AND YOU'VE SIGNED IT?

MR. CARPENTER: YES.

THE COURT: COURT WILL ALSO COUNTERSIGN IT. IT

Motion is denied. He may remain. Proceed.

SEAN HAMBLIN

Having first been duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MS. BEATON:

Q Please state your name.

A Sean Hamblin.

Q And where do you currently work?

A Weber Morgan Narcotics Drug Force.

Q How long have you worked there?

A A little over two years.

Q And what do you do there?

A I am an agent.

Q Okay. And do you have an agency that you work for as well?

A Yes. Ogden Police Department.

Q How long have you been with the Ogden City Police Department?

A Approximately six years.

Q Okay. Were you involved in a search warrant that was executed on August 14, 1998 at approximately 9:25 in the evening?

A I was.

Q What involvement did you have?

A I was part of the entry team.

Q How many people entered the home?

A I'm not sure. I think, I believe it was our entire strike force which is about 10 to 12 people.

Q Okay. In what order did you enter the home?

A I was the first agent.

Q Why did you enter the home first?

A I was the first to exit the van and approach the house.

Q Okay. Did you notice anything as you were approaching the home?

A I noticed a black male looking out some blinds in the window.

Q What is the address of the home that you went to?

A It was 2534 Orchard.

Q We have kind of a diagram here of it. Does this appear to be consistent with the floor plan of the house?

A Yes. Yes.

Q You said that you approached the house. Which side did you approach the house from?

A I would actually be coming from the west side of the house running eastbound towards the front entrance door.

Q Do you know their names?

A I don't. I didn't interview them or anything.

Q Okay. So we just know that they're females?

A Yes.

Q (Inaudible). And, what did you do with Quentin Jones originally?

A Well, when we made entry, I screamed, "Police search warrant, I want to see your hands. Get down on the floor." And when I was doing it, while I was doing it, Quentin was down there and he'd bring up his hands and everybody cooperated. They did as I told. They got down and made sure they were all secured where their hands were out and I just swept the room. I swept the room to make sure nobody else was in trouble, that we didn't miss a suspect and things like that.

Q Did you see anyone else in the room at the time?

A I did.

Q Who else did you see?

A I saw the defendant.

Q Randolph Carpenter?

A Yes.

Q And originally, where did you first see him?

A He was laying on the floor in front of this couch right here (inaudible). Yeah.

Q Okay.

A (Inaudible) laying with his head to the East and his arms were out to his side. Yeah.

Q Just out to the side?

A Yeah. They was. He was cooperating just like the other ones who got down with their hands out so you could see their hands.

Q Was anyone near him?

A Agent Jensen was in the area, I don't know exactly where he was at but he was over in this area.

Q Okay. And did you have a sense when you went into the home that Agent Jensen was behind you somewhere?

A I knew he was behind me because that's--

Q The ordering?

A Right. But, as far as where he went, I didn't, I didn't turn around and watch him go anywhere. Afterwards, I knew where he went.

Q Okay. So you took care of your people and he took care of whoever he took care of.

A Right.

Q But at some point in time, you see him near the defendant.

A Yes. (Over talking).

Q At what point do you make this sweep or after you attended to Quentin Jones and the two females about

how long is it until you make the sweep where you turn around make sure the rest of the living room is secure?

A From the point of entry probably, I would say, about three to five seconds.

Q Okay.

A Just enough time for them to go down cooperatively and make sure I've got their hands, I just turn around like that. I just looked around to make sure everything was okay in our room.

Q Okay. And everything seemed to be fine?

A Yeah. And everybody was cooperative.

Q Were there more agents than just you, Agent Jensen and Agent Hamblin in the home?

A Oh yes, yes.

Q Who else was in the home?

A There was Agent Hansen, I believe, agent, or it would be Sergeant Coleman was there and I'm not sure if AP&P was with us on that or not. I'm pretty sure they were, so we had probably at least two APP agents there as well.

Q And were any of them in the living room area with you?

A I can't say specifically who was, but I know when I was taking, after I swept the room, came back, I started to secure Mr. Jones. He's the one I handcuffed.

Q Prior to the box being opened, do you recall the defendant saying anything?

A I don't. Like I says, I didn't talk to him at all specifically.

Q Okay. After the box was opened, do you recall him saying anything?

A Eventually, not right when he opened it, but yeah, eventually when he was getting processed to go to jail, I heard him say something about the box.

Q Was he still at the home at the time when he talked the box or was he at the jail?

A No, he was right there in the living room and I believe Agent Jensen was filling out the pre-booking and PC for him to be transported to jail.

Q Okay. What did you hear the defendant say about the box?

A He either, he asked what he was being charged with or what's going on and Agent Jensen said, you know this, what was in the box and he stated, "That's not my fucking box."

Q And then did you hear the defendant make any comments at the Weber County Jail?

A I didn't go to the Weber County Jail.

Q Okay. After you do all of this processing of this particular piece of evidence, is that then when you

Q Yeah.

A --they were probably taken over here so we could leave a pathway to get up in there.

Q Right. So in actuality, when you were securing it, these folks may have wound up over here.

A Right here. Right. Because the couch is right here, it would be like in front of the couch.

Q Okay.

A But it wouldn't be past this couch. Does that make sense?

Q Yeah, it does. That's fine. That's all I need.

A Okay.

Q All right. Now, the only discussion you ever had -- and you never saw the box in Mr. Carpenter's hand.

A Right. I never did.

Q And more importantly, you never saw Mr. Carpenter dive to the ground with something in his hand, is that right, when you went inside?

A I didn't see him.

Q You don't know how he got on the ground.

A Right.

Q He was there when you saw him.

A Right.

Q Okay? And the only other thing in your entire going through this case and looking at it with respect to

Mr. Carpenter, is that he said in effect later on, "That's not my box" with another epithet in there; is that right?

A Right.

Q He never acknowledged that he had anything to do with that box.

A No. No, he didn't.

Q In fact, he was (over talking)

A I never talked to him about the box. I just heard that epithet.

Q He was rather emphatic about it, wasn't he?

A He was.

Q Okay. Now, so that I'm clear. Do you have your report in front of you, I think?

May I approach the witness?

THE COURT: You may.

Q (BY MR. CAINE) Thank you. You testified, well we won't get into that, but, your testimony, as I heard it was that you had talked with Quentin Jones, this individual.

A Quentin Jones, yes.

Q All right? Okay. Who by the, just so that we're clear is a white male.

A Yeah, he's white.

Q He's not a black male. The only black fellow

Q Did you ever look to the left to see how may people Agent Burnett was handling?

A Yeah, it was, it was, the door was such that when it came opened, all I could see was three occupants on the couch. Agent Burnett took, started taking an initiative towards them and I swept the room. I knew there was more agents behind me to assist.

Q Okay. As you sweep to the right, do you notice anything about the defendant?

A Yes.

Q Well. Let's, what I'd like to talk about where he first was when you sweep to the right.

A When I come through the door, I immediately swept this way. I saw, saw the defendant, Mr. Carpenter, sitting on the couch at the very end. That would be the south end of the couch, almost to the arm, but he's on the cushions.

Q Okay. So we'll mark this as the defendant, Randolph Carpenter, R.C.?

A Yes.

Q Okay. And do you see anything that the defendant is holding at that time?

A I see a black object in his left hand which heightens my (inaudible). I fixated on that. That's the most common place for a weapon that is, you know, a

danger to officers.

Q You it in his left hand or his right hand?

A His left hand.

Q Okay. It's in his left hand. Is he doing anything with that item?

A As I'm coming in, I'm ordering him to the ground. He's got it in his hand. He stands up and (inaudible) he goes to the ground and he kind of drops it and throws it and it rolls and he (over talking).

Q Kind of tosses it out?

A Yes. Yes.

Q Okay. Where does it end up laying at this point? (Inaudible) show us.

A It falls off to his left near the edge of the coffee table.

Q So, in this general area.

A Yes.

Q That's where the little green mark is.

A Where the green box is. In that vicinity, yes.

Q Okay. Now originally when you see this item, this black thing in the defendant's hand, can you tell at that point what it is?

A No. All I'm seeing is black. And then that just kind of draws my attention to it. I'm not sure what it is. I'm don't know if it's a weapon or if it's a

table. I want to be clear about that. That's what you saw.

A Yeah. I called Agent Burnett over to...

Q Called Agent Burnett over and again as you've testified, and we've finally cleared up with Agent Burnett, this is before he's talked to Quentin Jones or the young lady in the back bedroom about what they may or may not have done with Mr. Carpenter. You immediately tell him, in effect, I saw him drop this, or throw it, or whatever and pick that up and secure it.

A I told him that I saw Randolph drop that on the ground.

Q Okay.

A That's when Randolph said, "It's not mine."

Q All right. So you told him, excuse me, Burnett, that you saw Carpenter drop it, secure it and then it was opened right then.

A After he denied ownership, yes.

Q Okay. Said, "It isn't mine." And then it was opened right then in your presence and Officer Burnett's presence?

A It was brought to the evidence table. Then it was opened by us.

Q Again, there was no intervening discussion before it was opened, with anybody else?

whole speech? Thank you. We'll submit it.

THE COURT: All right. The Court is prepared to rule on the matter. The issue of standing in regards to the house seems to me to be fairly clear. I'm of the opinion that Mr. Carpenter, based on what I've heard, did not, would not have standing to question the search of the home in this particular situation.

In regards to the item of the black box, it is a difficult situation. It is unclear whether or not he is the owner of the box. It is clear that he had the box in his possession. The search occurred immediately after his possession of the box. I think that gives him standing to question the legality of that particular search.

On the other hand, though, I do agree with you, Ms. Beaton, it becomes a factual issue as to whether or not the State can, in fact, prove beyond a reasonable doubt that he possessed that with the intent to distribute as it's been indicated there and I think it's an issue that does go to the jury.

Looking at the Motion to Suppress, the officer testified that Mr. Carpenter had that box in his hand. He told him to hit the ground, he hit the ground and whether he cast it aside or whether it came out of his hand when he hit the ground or whatever, the box rolled

out, it was about a foot, a foot and a half away. The officers then went over, explored and looked inside the box.

I am of the opinion that the search warrant was broad enough, they were at this house to look particularly for objects that could have contained drugs. They did not search Mr. Carpenter because they didn't have any ability to search persons that they were expected to find. They were entitled to search objects. They searched the box pursuant to a warrant that allowed them to be there and inside it they found cocaine. I think it simply is the Motion to Suppress is denied. I do think it's a factual issue that goes to the jury as to whether or not Mr. Carpenter possessed that sufficiently to show an intent to distribute.

Ms. Beaton, you'll prepare the Findings of Facts, Conclusions of Law and the denial of the Motion is suppressed.

MS. BEATON: I will.

THE COURT: Thank you.

MS. BEATON: Your Honor, we need to set this for jury trial. I don't have the trial schedule.

MR. CAINE: Can we, I don't either. Can we put this on the calendar for Wednesday and then we'll come over and then we can set the trial date.